Department of Law Monthly Report

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In This Issue

Collections & Support

The primary focus for the Collections Unit in the month of September was the permanent fund dividend attachment. During September, defendants began receiving notices that they would not receive their dividends due to attachment for payment of fines, restitution, and other debts. As a result, by the end of the month, the unit saw a dramatic increase in the number of telephone calls regarding the attachments. Responding to these calls, as well as letters and e-mails, requires a significant amount of time on the part of all members of the unit. Not surprisingly, September and October are very busy months for the unit.

During August and September, the Collections Unit opened 128 criminal and 39 juvenile restitution cases for collection. We returned 23 judgments to the issuing courts or DJJ due to insufficient information. Initial notices were sent to 403 recipients. Judgments were paid in full and satisfactions of judgment were filed. Our office received payments totaling $83,648.89 toward criminal restitution judgments, and payments totaling $13,772.19 toward juvenile restitution judgments. We requested 462 disbursement checks, and issued 264 checks to recipients.

National Medical Support Notice

AAG Leroy Latta obtained compliance by employer Graybar regarding National Medical Support Notices issued by CSED. These notices are issued by CSED to companies that employ non-custodial parents who are required to provide health insurance for their children. Under ERISA and federal child support regulations, employers are required to honor National Medical Support Notices and treat those notices as qualified medical child support orders for purposes of enrolling the children in employer-provided health insurance.

Although Graybar is a large telecommunications company with 8,000 employees across the country, its human resources office had apparently never seen a National Medical Support Notice and, therefore, rejected the notice as being non-compliant with the requirements of ERISA. We sent a lengthy letter to the personnel officer at Graybar explaining what a National Medical Support Notice is and the fact that federal law requires both CSED to use the notice and Graybar to comply with it. The letter was referred to Graybar's corporate counsel, who called to say that Graybar would comply immediately.

Court Vacates Order On Child Support Entered in Delinquency Proceeding

AAG Pamela Hartnell obtained an order from Superior Court Judge Savell setting aside an order that had improperly vacated an administrative child support order. This case involved the parents of a child, Taylor, who was in state custody as a result of a juvenile delinquency proceeding. In April 2003, CSED established an administrative order requiring Taylor's parents to pay support based on their actual income according to the percentage of income approach of Civil Rule 90.3. The order set the father's obligation at $546 per month and the mother's obligation at $90 per month.

The parents appealed that order by requesting an administrative review. The review was scheduled for May 5, 2003. Before the review was completed, the parents filed a motion in the delinquency proceeding, asking the court to set aside the administrative order and to set child support. CSED had no notice of that motion. On June 30, 2003, the court granted the motion. The order relieved the parents of the obligations established by CSED's administrative order and imposed a minimum support order of $50.00 per month for both parents.

At CSED's request, AAG Hartnell filed a motion to vacate the June 30 order. Ultimately, Judge Savell agreed with the state's argument that the parents did not exhaust their administrative remedies. The judge found that there were simultaneous child support proceedings and that the court proceeding should be abated because CSED's order was issued before the court order. Judge Savell remanded the case to CSED to complete the administrative process. Thus, the judge refused to allow the parents to circumvent the administrative process and forum shop to the superior court.

Personnel

The Collections & Support Section said goodbye to long-time Assistant Attorney General Richard Sullivan. Rick had been with the section for five years and, prior to that, he worked in the Human Services section for many years. Rick will be greatly missed.

Commercial & Fair Business

Alaska Commission on Postsecondary Education

On August 1, 2003, Judge Michalski, in *Virginia Hardham v. ACPE, University of Oregon, et al.*, granted the Oregon defendants' Rule 12(b)(6) motion to dismiss. He had previously granted ACPE's 12(b)(6) motion in June. Judge

Michalski also denied Hardham's motion for reconsideration of his June order regarding ACPE, and he granted ACPE's motion for fees and costs by awarding ACPE fees of $2,913.00 (= 40% of the fees calculated at the rate of $150/hour) and $1,651.48 (= 100% of the paralegal fees incurred). Hardham has appealed these rulings to the Alaska Supreme Court.

HIPAA Compliance Update

The state's HIPAA (Health Insurance Portability and Accountability Act of 1996) compliance efforts continue. AAG Elizabeth Hickerson has been working with HIPAA Compliance Officer Kathleen White of the state's Department of Health and Social Services to ensure that the state is in compliance with HIPAA privacy requirements for individual health information. Hickerson has assisted in the review of state contracts and grants with health care providers who deliver services to the public. She has helped draft special HIPAA agreements that have been executed with business entities that perform a function or activity involving the use or disclosure of individually identifiable health information. Hickerson also has drafted a complaint procedure as required by federal regulations for when an individual believes the state has violated HIPAA, which is presently under review by DHSS. There has been some joint work between the Division of Insurance and DHSS to address insurance companies' compliance with HIPAA privacy requirements.

Environmental

Argument Held on Challenge to Constitutionality of House Bill 86

AAG Chris Kennedy defended the constitutionality of HB 86 in briefing and oral argument before Judge Sen K. Tan. HB 86 is a bill introduced by Representative Fate and passed by the legislature in 2003 that, among other things, streamlines the appeals process for Coastal Zone consistency determinations and provides direct legislative approval of certain oil and gas projects in the Cook Inlet Basin. Cook Inlet Keeper, an opponent of a Forest Oil project in Lower Cook Inlet, challenged the legislature's authority to take these actions. A superior court decision is pending.

Trailside General Store Cleanup

This multi-forum cost recovery case for cleanup of the former Homer Trailside General Store gasoline convenience store is coming to a very successful resolution. As a result of the State's efforts in Homer Superior Court, Federal Bankruptcy Court in Salt Lake City, and in Wyoming Probate Court, the state has recovered over $1.4 million in past and future cleanup costs.

In 1999, a serious gasoline leak was discovered at the site when gasoline began surfacing from cracks in the pavement below the gasoline dispenser island. In addition to the Trailside General Store, the site also housed the Homer branch of the State Legislative Information Office. The Wyoming Alaska Company (WACO) began the clean up and then stopped in mid-course, when its insurer withdrew coverage, leaving a large open excavation at the Trailside Store site and tons of excavated petroleum contaminated soil on private property near the Anchor River. DEC undertook cleanup at the site through its state term contractors and has incurred approximately $750,000 in clean up and litigation costs.

In July, 2000, the Environmental Section filed a civil suit against WACO, its CEO Reuel Call, and Bonita Blunk to force clean up of the site and recover the state's costs. In February 2001, WACO filed for chapter 11 bankruptcy reorganization in Utah. The state then added the landowner of the site, Red Rose Rentals,

Inc., and its insurer, Commerce and Industry Insurance Company (C & I) to the Alaska litigation. As a result of a settlement between, Red Rose, the state, and C & I, the state has received $818,000 to partially compensate the state's past and future clean up costs. This settlement was approved by the U.S. Bankruptcy Court in Utah.

Under an earlier bankruptcy settlement approved by the Bankruptcy Court, WACO agreed to a judgment in favor of the state in the amount of $2,092,622. The state received $375,592 of this sum as a priority administrative expense claim. The State also entered into an "ability to pay" settlement with individual defendant, Bonita Blunk, for $8,500.

A pending insurance settlement between WACO, C & I and the state involving division of a recovery by WACO, if approved by the bankruptcy court, would resolve the state's insurance claims and effect a global settlement among the parties. The state would receive an additional $50,000 recovery.

The state also pursued clean up cost claims against the Estate of Reuel Call, the former WACO CEO, who directed the refilling of the USTs. The state and the Estate agreed to liquidate the state's claim in the Wyoming Probate case in the amount of $250,000 to be secured by the state's lien on Call's property in Sterling, Alaska. The Wyoming Probate court recently approved sale of the Sterling property and the state will receive approximately $113,500 as a result of its secured claim in the probate. In total, the state should receive approximately $190,000 from the Probate.

AAG Breck Tostevin represented DEC in the Homer action, the Salt Lake City action, and in Wyoming Probate court for Lincoln County.

Settlement Reached With the Alaska Railroad On Gold Creek Derailment

The Department of Law reached a settlement with the Alaska Railroad Corporation concerning the state's claims for oil spill penalties and damages to Denali State Park from the December 1999 railroad fuel spill near Gold Creek.

Under the settlement, the State of Alaska received $125,054 to resolve the state's claims for civil assessments and oil spill penalties arising out of the fuel spill and cleanup. The Railroad has paid an additional $52,041 to reimburse state oversight costs incurred over the last year. The Railroad will reimburse future cleanup and restoration oversight costs incurred by DEC, State Parks, Fish & Game and the Department of Law and will complete necessary cleanup and monitoring as required by law.

In addition, the Railroad will complete site restoration work requested by Alaska State Parks by October 2004. The restoration work involves the removal of structures and gravel pads and preparation of the site for natural re-vegetation.

This settlement involved claims left unresolved by an April 2001 Consent Decree between the state and the railroad in which the railroad vessel owner has reimbursed DEC for its response and cleanup costs of $15,604 and paid a $1,528 civil assessment in settlement of the state's claims. AAG Alex Swiderski represented DEC.

Human Services

***Martin N. v. State, DFYS,* 2003 WL 22113719, Alaska, Sept. 12, 2003**

The Alaska Supreme Court upheld the termination of a father's parental rights over challenges that the child was not at risk of harm because the father had not harmed her in the past (despite his being on all-around violent person, having shot the child's mother while she was pregnant with the child, and having been involved in numerous altercations while incarcerated).

The court found that the totality of the evidence indicated a present danger to the child of both physical and mental harm. The court rejected the argument that the child would not be in danger while the father remained in jail. In rejecting this argument the court stressed the need for young children to achieve permanency. The court also rejected the argument that OCS did not provide the father with adequate efforts while he was in jail, noting that the father had managed to land himself in maximum security, thus removing the potential for efforts on his behalf. The court held that "the Department of Corrections rather than DFYS has primary responsibility for providing services" to incarcerated parents and that the child should have been placed with the father's relatives. AAG Toby Steinberger handled the appeal for the state.

***Frank E. v. State, DFYS, 2003* WL 22220953, Alaska, Sept. 26, 2003**

The Alaska Supreme Court affirmed the termination of a father's parental rights over his challenges that the department had not made reasonable efforts to reunify him with his child, and that the court could not terminate his parental rights based upon his lengthy upcoming prison sentence until his appeal of his criminal conviction had been resolved. On the first point the court held that the state's duty to supply a parent with reasonable efforts at reunification "is fulfilled by setting out the types of services that a parent should avail himself or herself of in a manner that allows the parent to utilize the services." The father had argued that statutory language requiring the department to "actively offer" services to parents required the department to do more than just refer parents to available services. The majority did not reach the prison sentence issue, but Justice Matthews wrote a concurrence stating that he would have affirmed the superior court on this issue. He reasoned that the state's statutory policy that children should expeditiously receive permanent placements allows termination of a parent's rights without need for the state to provide efforts at reunification as soon as the parent is convicted and sentenced to a lengthy term, and thus becomes unavailable to function as the child's parent without the need to await the results of any appeals or post-conviction proceedings. AAG Mike Hotchkin handled the appeal.

***James G. v. State, DFYS,* MO&J #1141, Sept. 17, 2003**

The Alaska Supreme Court released an interesting decision in *James G. v. State.* The trial court had ordered a father, whose children had been adjudicated to be in need of aid, to undergo a sex offender assessment as part of his case plan to be reunited with the children, even though insufficient evidence was presented for the court to find by a preponderance that the father had sexually abused the children or that they were at substantial risk of being sexually abused by him.

The supreme court affirmed the case plan, noting that allegations of sexual abuse had been raised, and that sufficient evidence had been presented to cause the trial court concern. The court held that in fashioning the

disposition plan in this case the best interests of the children, and the need to insure their safety, provided good cause for ordering such an assessment. The court released this decision as an unpublished Memorandum Opinion and Judgment; our motion to have the decision re-released as a published opinion is pending, as is the father's petition for rehearing. AAG Mike Hotchkin represented the state in the appeal.

Francis and Tillie Bell v. State of Alaska, Department of Health and Social Services

Francis and Tillie Bell live in Chevak with their five natural children. They applied for a foster care license so three foster children could be placed with them. On September 4, 2003, the Bells filed a complaint against the state in the Anchorage Superior Court alleging that the Office of Children's Services failed to process their foster care license application in a timely manner. In the complaint they seek preliminary and permanent injunctive relief and a declaratory judgment. They asked the court to expedite consideration of their motion for a preliminary injunction.

On September 12 the Anchorage Superior Court judge assigned to the case refused to give expedited consideration to the Bell's motion for preliminary relief. After the hearing, the case was transferred to the Bethel Superior Court upon stipulation of the parties. The state filed a motion to dismiss the case that is currently pending before the court. AAG Dan Branch represents the state in the case.

Native Village of Curyung, Native Village of Ekwok, Native Village of Kwinhagak, and Native Village of Chevak v. State of Alaska, Department of Health and Social Services

Four Native villages from Western Alaska brought this suit against the state in the Dillingham Superior Court, alleging violations of the Indian Child Welfare Act, Alaska's children protections statutes and two federal funding statutes. The plaintiffs are suing in their name and that of their members in parens patriae. They seek a declaratory judgment establishing that the state violated federal and state child protection statutes, an injunction prohibiting the state from future violations, and the appointment of a panel of experts to oversee the state's child protection system.

Judge John Reese is assigned to the case. He is currently considering three motions to dismiss filed by the state. Judge Reese heard oral argument of the motions on October 6, 2003. AAG Dan Branch represents the state in this case.

Labor & State Affairs

Libertarian Party Settles Constitutional Challenge

The Alaska Libertarian Party and its treasurer, Len Karpinski, sued the Alaska Public Offices Commission and its commissioners, alleging that application of the statutory definition of "political party" to the party violated their civil and constitutional rights, including the rights of political association and equal protection. The State formerly had a definition of "political party" in its campaign finance laws that differed from the definition of "political party" in the State's election laws. The Alaska Libertarian Party met the definition in the election laws, but not the definition in the campaign finance laws, so it did not qualify for the higher limits that apply to political parties for making and receiving contributions. The Alaska Libertarian Party and its treasurer claimed that application of the definition in the campaign finance laws violated their civil and constitutional rights.

During the last legislative session, the legislature amended the definition of "political party" in the campaign finance laws to parallel the definition in the election laws. Despite the change, the plaintiffs claimed that they were

entitled to relief for past violations of their rights, but agreed to settle the case for a portion of their actual attorney's fees. AAG Dave Jones handled this case.

Alaska Supreme Court Issues Decision Affirming Wagoner Election

Two individuals filed an action to enjoin the certification of Thomas Wagoner to Senate District Q seat. On September 19, 2003, the Alaska Supreme Court issued its written decision rejecting the challenge to Senator Wagoner's election. It held that substantial compliance was the appropriate standard to measure a violation of the public official financial disclosure law and that a challenger must show that the violation affected the outcome of the election to invalidate the election. This decision followed an order that the court issued before the legislature was seated in January, affirming the election.

AAG's Jan Hart DeYoung and Sarah Felix handled this case.

Court Affirms Dismissal of Probationary Employee

On August 8, 2003, the Alaska Supreme Court affirmed an order of summary judgment dismissing the complaint filed by a former state employee who was discharged for failing to satisfactorily complete his period of probation. The court agreed with the Department of Corrections that David Witt was a probationary employee who could be dismissed for any reason that was not illegal (or, as the court stated, Mr. Witt was not entitled to dismissal only for good cause). The court further found that Mr. Witt failed to provide evidence that he was dismissed for an illegal or otherwise improper reason. The court awarded attorney's fees to state for the appeal, in addition to the fees awarded in superior court. AAG Jan Hart DeYoung handled this case.

Marijuana Initiative Petition Signatures Must be Counted

Judge Suddock issued a decision on September 23, 2003, in which he ordered the Division of Elections to count previously rejected initiative petition signatures. The background of this case is that the division had rejected numerous petition signature booklets in January 2003, and therefore there were insufficient signatures to qualify this initiative for the ballot, and the lieutenant governor denied certification of the initiative. The division had rejected signatures in approximately 190 booklets. Of these booklets, 142 were rejected for the initiative sponsor's failure to submit a "sponsor accountability report" for each booklet. The court found that the division could not reject the booklets for this reason, and required that the signatures be counted. The court also found that for approximately 30 rejected petition booklets the sponsors would be allowed an additional three weeks to verify that the petition circulators satisfied residency requirements.

The court allowed the division 60 days to count the signatures in the previously rejected booklets. It is anticipated that there will be sufficient signatures to qualify this initiative for the ballot when the previously rejected signature booklets are counted. The court upheld the division's authority to adopt regulations governing the initiative process, and upheld the regulation at issue in this case. However, it found that a requirement of materiality must be read into the regulation such that initiative petition signature booklets would not be rejected for minor technical errors. The state will not appeal the court's decision.

AAG Sarah Felix handled this case.

Legislation & Regulations

Legislation and Regulations Section Presents Statewide In-Person Training Sessions in Anchorage, Juneau and Fairbanks

During September, the Legislation and Regulations Section conducted its first statewide in-person training classes in Anchorage, Juneau and Fairbanks. Over 100 state employees and assistant attorneys general participated in the program. The topic of the classes was basic regulations training for those new to the field and a refresher for those with experience. The section thanks everyone for their attention to this important training to improve the regulations process.

The section also conducted final legal reviews for a number of state agencies, including the Department of Health and Social Services (Denali Kid Care, Alaska Senior Assistance Program); the Department of Community and Economic Development (credit unions, premium loan companies, small loan companies (NPR – A municipal impact assistance, numerous occupational licensing board projects); the Division of Elections (election precinct boundaries); the Department of Environmental Conservation (air quality fees); the Department of Transportation and Public Facilities (airport parking services); and the State Board of Education and Early Development (library assistance grants).

The section continued editing proposals for consideration for the governor's bill package for the next legislative session.

Natural Resources

Subsistence Issues Appealed to Alaska Supreme Court

We reported in May, 2003, that the Anchorage Superior Court had entered a summary judgment order ruling, in part, that one of Alaska's Tier II scoring regulations violated the Article VIII equal access clauses. *Manning v. State of Alaska, Dept. of Fish and Game.* Following entry of final judgment in July, the state appealed the decision. Mr. Manning followed up with a cross appeal on the other two regulations he had challenged, and on which the state prevailed.

The issues arise, primarily, out of various statements made by the court in *McDowell v. State*, the 1989 case which put the State out of compliance with ANILCA and resulted in the federal takeover of subsistence management on federal public lands. Mr. Manning argues that the state may not look at any community – based values, such as the local cost of store-bought food, under the *McDowell* rulings. The state, represented by AAG Kevin Saxby, argues that such an interpretation is far too extreme. This is the first opportunity the court will have to examine the scope of its *McDowell* ruling in about eight years, so the law in this area is ripe for clarification.

Opinion Issued on Koyukuk Moose Management

The Alaska Supreme Court issued an opinion in *Koyukuk River Moose Co-management Team v. State,* the second in a series of suits from a coalition of Koyukuk River-area villages challenging moose regulations in Game Management Units 21D and 24. The court affirmed the superior court's summary judgment in favor of the state on all counts. The court was aware of the intense effort ADF&G had made to conduct planning, involving local participants, for these moose

populations, and deferred to the Board of Game's decisions on the appropriate levels of harvest and other technical management issues. AAG Kevin Saxby represented the state in this case.

DNR Prevails in Mining Entry Dispute

The "rock dump" south of Juneau, consists of processed tailings from a mining operation that closed at the end of World War II. For the past twenty years, a prospector, Mr. Hayes, litigated with the successors to the original mine owners, A.J. Associates ("Associates") over the right to enter the rock dump and dig for gold. At one point, the parties agreed that Hayes would transfer certain mining claims to Associates and Associates would seek a Mineral Closing Order (MCO) from the Department of Natural Resources terminating the mining rights in those claims. In late 2001, after public notice and opportunity to comment, DNR issued the MCO. The MCO closed the rock dump to new mineral entry "subject to existing federal **rights**."

Hayes filed an appeal in superior court claiming that DNR violated his due process by receiving ex-parte communications from Associates and by not conducting an oral hearing. Hayes also claimed that Associates did not have standing in the action and that the MCO would operate as a taking of his federal mining rights.

Judge Collins rejected all of Hayes's claims. Among other rulings, the judge held that Hayes was not entitled to respond to Associates' communications to DNR because the closure action was not an adversarial proceeding. She also ruled that the MCO does not affect any of Hayes's mining rights and, in any event, those rights are subordinate to Associates' rights to the rock dump.

Hayes did not appeal the superior court's decisions, and he was ordered to pay $1000 toward the state's costs and attorney's fees. Former AAG Blaine Hollis represented DNR in this action.

State Resolves Dispute with Fairbanks School District

The State of Alaska has resolved its dispute with the Fairbanks School District over the application of AS 36.15 (local agricultural product preference) to the School District's bidding process. In the agreement, the School District acknowledges that the state's product lists under AS 36.30 are not determinative of a local agricultural product bidding preference. Matanuska Maid had appealed the School District's denial of Matanuska Maid's bid on a FY 2003-2004 milk contract. The agreement avoids briefing and argument in Fairbanks Superior Court and sets basic guidelines for future School District solicitations. AAG Dennis Wheeler is handling the case for the Division of Agriculture.

Oil, Gas, & Mining

Oil and Gas Exploration Tax Credit Regulations

The Oil, Gas, and Mining section assisted the Department of Revenue in drafting regulations to implement the oil and gas production tax credit enacted by the legislature in 2002, and amendments to update the oil and gas production tax regulations. The department intends the new regulations to become effective on January 1, 2004.

Oil and Gas Property Tax Procedures Challenged by Valdez

The Oil, Gas, and Mining section filed dispositive motions defending the Department of Revenue against the City of Valdez's administrative challenge to the department's oil and gas property tax procedures and policies during the past 29 years. The superior court

denied the City of Valdez's request to be relieved of the requirement to exhaust its administrative remedies.

Globe Creek Mine Appeal

Fairbanks Exploration, Inc. appealed to superior court from a decision of the commissioner of the Department of Natural Resources. The Oil, Gas, and Mining section is preparing briefing on issues of whether a limestone deposit is subject to "location" under the mining laws. Fairbanks Exploration, Inc. also filed a tort action against the DNR and Department of Transportation witnesses who testified at the administrative hearing. The Oil, Gas, and Mining section is assisting the Torts section in that litigation.

Opinions, Appeals & Ethics

Opinions Issued on Cruise Ship Initiative

Two attorney general opinions were prepared and issued on the cruise ship initiative proposal. The first opinion, issued on August 15, advised the Lieutenant Governor to reject the initiative application because the proposed bill would have violated the single-subject rule. Under state statute and the Alaska Constitution, an initiative must be confined to a single subject. Our analysis of the measure found that it included three sections that pertained to subject matter that extended beyond the subject of regulating cruise ships. Because we recommended rejection on these grounds, the opinion did not reach a conclusion about whether the initiative would create a constitutionally prohibited dedicated fund.

Following the issuance of the opinion, the sponsors revised the initiative to address the single subject problem. A new application was submitted and a new opinion prepared. The second opinion was issued on October 6. It recommended to the Lieutenant Governor that he certify the initiative application.

The main issue was whether the initiative would constitute a dedication of funds. Under article XI, section 7 of the Alaska Constitution, the initiative cannot be used to dedicate revenues. The language of the initiative itself does not create a dedicated fund. However, the initiative raised the issue of whether a dedicated fund is created by federal law, the Maritime Transportation Security Act of 2002, which mandates that the state must spend revenues collected from vessels for specific purposes. We concluded that the framers of our constitution never intended to foreclose the state from being able to lawfully collect revenue which federal law might restrict as to use. Thus, we determined that the restriction on spending set by federal law is not a prohibited dedication of revenues by initiative.

AAGs Mary Lundquist and Joanne Grace worked on this opinion.

Ethics Act Training Provided to Governor's Office

AAG Paul Lyle provided a training session on the Executive Branch Ethics Act for staff in the Governor's Office. Paul works in the Fairbanks office and is now serving as the state ethics attorney. We hope to continue with these training sessions for state agencies as time allows. Paul also handled numerous ethics inquiries and issues in August and September, including post-state employment questions, gift disclosure issues, outside employment issues, and many other day-to-day questions from designated ethics supervisors throughout state government.

Torts & Workers' Compensation

Trial Judge Finds No Actionable Duty Owed By Conservator Other Than For Breach of Duties Ordered by the Court and Conservatorship Statutes

In *Trapp v. Office of Public Advocacy* the plaintiff alleged that the Office of Public Advocacy (OPA), as court appointed conservator, owed her an actionable duty to take additional steps beyond the court ordered conservatorship to solve her many problems stemming from alcohol abuse and mental illness. OPA moved for summary judgment on the grounds that no such actionable duty was owed; the plaintiff could sue only for breach of those duties ordered by the court and the conservatorship statutes. In September, Judge Michalski granted OPA's Motion for Summary Judgment. Plaintiff is appealing. AAG Venable Vermont represented OPA.

Alaska Workers' Compensation Board Denies Medical Benefits Claim for Conditions Unrelated to Work

Within six months of starting work as an administrative clerk, a state employee complained of painful symptoms affecting both wrists and her right elbow. Her physician diagnosed several conditions and said the employee's work duties caused them. The state paid workers' compensation benefits including the costs of four surgeries (one on each wrist and two on the right elbow) and 13 months of total disability compensation.

Disability payments stopped after the treating physician said the employee could return to her work and would have no significant permanent disability or impairment. Soon after, though, the employee complained of painful symptoms in both shoulders. Her physician then diagnosed a degenerative condition that he said had been substantially worsened by the employee's work duties 15 months before. When a medical expert retained by the state disagreed with that opinion the Board retained an independent medical expert to examine the employee and address the disputed medical opinions. The Board's expert agreed that the degenerative shoulder condition had not been brought about by work.

AAG Paul Lisankie represented the state at the Board hearing convened to determine whether the state was liable for additional benefits due to the shoulder conditions. He argued that the Board should rely upon the opinions of its medical expert, and that of the state's expert, to conclude that the employee's degenerative shoulder conditions had been worsened by the passage of time rather than by her work duties. Consequently, no workers' compensation benefits would be payable for any worsening of the condition unrelated to the employee's work for the state.

In its August 8, 2003, Decision and Order the Board found the opinions of its and the state's experts persuasive and consistent with the medical record. Based upon those opinions the Board concluded the state was not responsible for the worsening of the employee's degenerative shoulder conditions. It therefore denied the employee's claim for additional medical benefits.

Transportation

Favorable Supreme Court Construction Claim Decision

The Alaska Supreme Court issued a favorable decision in *Hawkins Northwest v. State.* The matter stemmed from the construction of a DEC laboratory in Juneau. The contractor asserted seven million dollars in claims against the state. After a fifteen day hearing, a hearing officer awarded $194,000 to the contractor.

The superior court, and now the supreme court, upheld the hearing officer's award. Former AAG Bill Cummings represented the state.

Federal Department of Labor Dismisses OSHA Complaint

A radiation safety officer with the Alaska Department of Transportation and Public Facilities alleged that DOT&PF retaliated against him for reporting radiation safety issues. Midway through his deposition, the safety officer asked to dismiss his action without prejudice to refile it. A federal administrative law judge instead dismissed the case with prejudice, meaning it cannot be refiled, because the state had not waived its constitutionally protected eleventh amendment sovereign immunity. The safety officer has appealed this decision, and is also pursuing his complaints before the Federal Nuclear Regulatory Commission. AAG Gary Gantz represents the state.

DNR Award of Air Tanker Contract Upheld

The Department of Natural Resources solicited proposals for an airplane to carry water for use by DNR in fighting fires, and awarded a contract. A company that did not receive the contract protested the award, claiming the air tanker DNR accepted did not meet the requirements set out in the solicitation. A hearing officer upheld DNR's decision after a 2½ day hearing. The unsuccessful proposer has appealed this decision and also filed a collateral lawsuit in the superior court. AAG Gary Gantz represents DNR in this matter.

Airport Leasing Hearing

A fish processor based at the Yakutat airport applied to renew its airport lease. DOT&PF denied the request, finding the lease was not for an aviation purpose as required by state and federal law. The fish processor appealed. AAG Peter Putzier represented DOT&PF during the four-day appeals hearing. A decision has yet to be issued.

Knik Arm Bridge and Toll Authority Formed

AAG Jim Cantor assisted with the formation of the Knik Arm Bridge and Toll Authority, a public corporation and instrumentality of the state with a mission to construct and operate a Knik Arm crossing between Anchorage and the Matanuska-Susitna Borough.

Personnel

The Transportation Section bid farewell to AAG John Athens, who retired after 23 years in the Fairbanks office. AAG Tom Dillon left the Anchorage office for a warmer life in Florida, and AAG Richard Monkman departed for private practice in Juneau. The Anchorage office also lost law office assistant Sabrina Alvarez and the Juneau office lost law office assistant Maria Flynn. The section hopes to report on successful recruitment efforts in the next newsletter.

Criminal Division

ANCHORAGE

Grand jury Presentations

The Anchorage office presented 41 cases to the grand jury during August and 48 cased during September. Crimes against children took center stage.

A man was indicted for sexual abuse of a minor and kidnapping of a five-year-old from his brother’s house. A 17-year-old was indicted for sexual abuse of a minor in the first degree for sexually abusing a five-year-old living in the same house. And a couple was indicted for assault in the first degree for mistreating their

five-year-old daughter. The child had appeared at Elmendorf Air Force Base Hospital weighing 22 pounds, after having weighed 45 pounds during a medical check-up six months earlier.

Two rape cases were unusual. In one case, a man was indicted for sexual assault in the first degree. He had forced the victim to marry him in Puerto Rico -- threatening to kill her -- in order to get admitted to the United States and then when she tried to leave Alaska to return to Puerto Rico, he sexually assaulted her. In another case, a cancer patient was indicted for sexual assault in the first degree for raping his caregiver; he fired a shotgun into the air to frighten her and then sexually assaulted her. There were also two cases involving rapes by strangers. A man was indicted for attempted sexual assault in the first degree for grabbing a woman walking on a bike trail in Anchorage, who was able to fight him off. And two men were indicted for sexual assault in the first degree when they convinced a woman at the Bus Accommodation Center in Anchorage to walk with them along the route her bus would be traveling and then sexually assaulted her, telling her she was stupid to have come with them.

In another case, a man was indicted for assault in the first degree for pistol whipping and shooting a sixteen-year-old in Mountain View. Finally, three men were indicted for the robbery of the McDonald's Restaurant in Mountain View. They hid in the bathroom of the restaurant until after closing time, and then ordered five employees to the floor at gunpoint. Civilian witnesses, including the manager of McDonald's, followed the robbers when they left on foot and directed the Anchorage police by cellphone, telling them when they had caught the right people.

An unregistered sex offender was indicted for kidnapping and sexual abuse of a minor in the second degree at the airport. The mother of a three-year-old fell asleep in the terminal at Anchorage International Airport, and awoke to find the child gone. An off-duty military police officer noticed the defendant walking back in the direction of the terminal carrying the three-year-old, which led to the arrest.

Three men were indicted for murder in connection with the robbery of the Taco Bell restaurant on Fifth Avenue on August 16, 2003. One of the men was charged with murder in the first degree for shooting the victim through the drive-up window. The other two were indicted for murder in the second degree.

Two men were indicted for first degree murder, and a juvenile is pending proceedings to waive him into adult court. After neighbors reported gunfire and described a vehicle leaving the area, police found the victim shot in the head in the garage of her home. Another officer spotted the vehicle described and, when the officer tried to stop it, the vehicle fled at high speed from several police officers who followed. Three males jumped out of the vehicle and fled on foot, but police surrounded the area and captured the three hiding in the area.

A man was indicted for assault in the first degree for firing shots from an AR-15-style rifle through the floor of his apartment, grazing a neighbor in the apartment below. Anchorage police found a marijuana growing operation in the man's apartment, and the man explained that he fired to protect himself and his marijuana grow from an intruder banging at his door.

Trials

A trial for driving under the influence showed that it is hard to convict when drugs other than alcohol are involved. Although the defendant was convicted of possessing cocaine (crack pipes and residue), there was a hung jury on driving under the influence. Although the defendant drove badly, her blood alcohol level was .000%.

ADA Taylor Winston obtained a conviction of Gene Anderson for several counts of sexual abuse of minor in the first and second degree for sexual penetration and sexual contact with a thirteen-year-old who was related to him.

Erin White tried two cases in Unalaska. In the first, a woman was acquitted in a jury trial for felony drunk driving. In the second trial, Jeffrey Massey was convicted in a jury trial for assault in the fourth degree for assaulting security guards when they escorted him out of the bar. Terry Stromme entered a plea to a charge of murder in the second degree. Last December Stromme choked his cellmate to death in the Sixth Avenue Jail in Anchorage. Other inmates witnessed the murder. Sentencing is scheduled for December.

In another example of the difficulty of convicting, even when self-defense is not really in issue, the jury hung in a trial for assault in the fourth degree. The defense stipulated that the defendant did not act in self defense at the start of trial, but changed its mind at the end of trial.

Sexual assault unit chief, ADA Steve Wallace, tried John DelaVega for sexual assault in the second degree, resulting in a mistrial because of juror misconduct.

Sentencings

Judge Fred Torrisi sentenced Carl Merculief to 99 year for murder in the first degree. Merculief was separated from his wife, and left St. Paul Island to live in Anchorage, threatening his wife that "if he couldn't have her, no one else would." His wife started seeing the new commander at the Coast Guard Station, Timothy Harris. In July 2001, Merculief flew back to St. Paul Island, went to the commander's quarters, pistol-whipped him and shot him to death. A jury on St. Paul Island convicted Merculief of murder in the first degree in February. ADA Adrienne Bachman represented the state.

Edward Soeth was sentenced to 99 years for second degree murder for strangling his girlfriend. ADA Adrienne Bachman also represented the state in this case.

William Grossman was sentenced to 99 year for murder in the second degree for kicking and beating a friend to death. Three-for three for Adrienne Bachman.

BARROW

After a six day jury trial, Ben "Asisaun" Leavitt was convicted of first-degree sexual assault. Leavitt had gone to the home of the mentally ill victim to sell marijuana to a roommate. The roommate was not at home, and instead the defendant offered the victim $100 for sex. When the victim asked for payment in advance, the defendant brandished a pair of scissors and forced the sexual act. At trial, the victim did not recognize the defendant and told the jury that she was sure the defendant was not the man who raped her. The victim had never met Leavitt, but had picked him out of a photo lineup nearly eight months prior.

BETHEL

Lewis Egress was found not guilty of sexual abuse of a minor in the fourth degree and convicted of the lesser-included charge of harassment after a jury trial in McGrath. A woman was found not guilty of assault fourth degree after a jury trial in Aniak.

The Bethel grand jury indicted two men sexual abuse of a minor; one man for sexual assault; two men for felony assault, and one man for burglary.

Richard Ross was found not guilty of assault in the fourth degree after a jury trial.

The grand jury indicted three men of sexual abuse of minor; a man was indicted for felony assault; a woman was indicted for forgery and theft and a man was indicted for theft; another woman was indicted for sale/possession of alcohol for sale; a man was indicted for escape; two men were indicted for felony driving under the influence and refusal; a man was indicted for misconduct involving a controlled substance.

FAIRBANKS

Jeffrey O'Bryant was been appointed as the Fairbanks District Attorney. Former DA Teresa Foster became the Statewide Sexual Assault Coordinator. Teresa will be developing and implementing department policies on how sexual assault and sexual abuse of children cases will be handled.

JUNEAU

In his first felony trial since being appointed as Juneau District Attorney, Pat Gullufsen won a difficult trial involving sexual abuse of a minor in the first degree, with victims who were three and four years old when the abuse occurred and four and five at the time of trial. Neither victim was able to recall and testify, so the trial judge admitted previous videotaped interviews. The defendant (father and uncle of the children) was convicted on all six counts.

ADA Doug Gardner obtained guilty verdicts on all counts in a burglary and theft trial. The trial court ruled that expert testimony on footprint patterns was not a *Daubert* problem.

The office also did a number of misdemeanor jury trials, one of which was the first for the office under the contempt statute for a third-party custodian's failure to report the non-presence of a defendant.

The Juneau District Attorney's Office completed two felony jury trials in September. One resulted in an acquittal on a sexual abuse of a minor in the second degree charge. The other was a guilty verdict obtained by Rick Svobodny in a sexual abuse of a minor in the first degree trial where the defendant was 17 years old and for this offense was automatically waived to adult court.

An illegal alien drug ring was broken up by the arrest of ten persons and the seizure of $15,000 cash and cocaine. Numerous search warrants were obtained with the assistance of the Juneau Office and the persons arrested were held on state charges until deported by the Immigration and Naturalization Service.

KENAI

This was the month for trials on the Peninsula. A Seward jury convicted a defendant on all eighteen counts charged, including kidnapping, first degree sexual assault and numerous counts of assault in the second, third and fourth degrees, as well as reckless endangerment. The jury was barely out an hour, and during that time they were occupied with ordering dinner.

A Homer defendant was convicted of driving under the influence with a breath test reading of .078%. The only witness for the state was a very convincing trooper.

Our visiting Assistant District Attorneys have been succeeding at trials as well. Juneau ADA Jack Schmidt went down to Homer and convinced a jury that the defendant was, in fact, a minor who had been consuming alcohol, despite the defendant and his friends testifying to the contrary.

We have also fought back two challenges to the constitutionality of the statute regarding sexual assaults by defendants in positions of authority, in one case a village public safety officer and the other involved a chaperone at a teen center.

KETCHIKAN

In September, Ketchikan ADA James Scott handled a misdemeanor assault trial in Juneau, involving assaults that occurred at Lemon Creek Correctional Center. The jury convicted on both counts.

KODIAK

While being arrested for possessing a codeine tablet without a prescription, a Kodiak man was also found to be illegally possessing a concealable weapon. This defendant was sentenced to serve 25 months in jail following his conviction for misconduct involving a controlled substance in the fourth degree and misconduct involving weapons in the third degree.

Another Kodiak man was sentenced to serve six months in jail and placed on probation for five years following his conviction for misconduct involving a controlled substance in the third degree. Earlier in the year, this defendant had sold a gram of cocaine to an undercover informant working with the Kodiak Police Department. In a related case this defendant was also sentenced to serve 45 days for assault for later threatening the undercover informant with bodily harm. The sentences were to be served consecutively.

A Kodiak man was sentenced to serve nine months in jail following his conviction for failing to appear for a hearing in the prosecution of a felony drug case. He was also ordered to pay a $1000 fine and placed on probation for five years following his release from incarceration.

A jury found a Kodiak man not guilty of sexual assault of a minor in the first degree following a five-day trial. In another case, a 63-year-old Kodiak man was sentenced to 9 months in jail following his July trial conviction on two counts of selling marijuana to an undercover informant working with the Kodiak Police Department. In addition, the man was placed on probation for five years.

A Kodiak woman was sentenced to serve 45 days in jail and ordered to repay the State of Alaska $18,838 in restitution and penalties following her conviction for scheme to defraud. This defendant had defrauded the State Department of Labor by claiming and accepting unemployment insurance benefits while she was working full time. She was also placed on probation for 10 years, although she can petition the court to end her probation after 5 years if she has repaid the entire balance of her restitution and otherwise fully followed the terms and conditions of her probation.

A Kodiak man was sentenced to 180 days in jail and fined $250 dollars following his conviction for assault in the fourth degree. This defendant had started a fistfight in a local bar after believing that a woman to whom he had given a drink was laughing at him with her friends. In a related case, a friend of the defendant was sentenced to serve nine months in jail for felony assault for coming to his friend's "rescue" with a pool cue which he broke across the victim's forehead. Fortunately for all, the victim suffered no permanent injuries.

KOTZEBUE

Two people from Kobuk were arrested after attempted to drown an adult male in a puddle in the village. Witnesses report that the two were trying to hold the man’s head under the water, with one urging the other to “kill him.” The events leading up to the attempted drowning, and the motive for it, are not entirely clear; a substantial quantity of alcohol was involved. The state presented an attempted murder case to the grand jury, but the grand jury elected to charge assault in the second degree.

A Kiana man was arrested for an incident occurring in Kotzebue and charged with sexual assault. Kotzebue police, responding to a call for help at the Bayside Hotel, found a nude female wrapped up in a blanket, who reported

that the defendant forcibly tried to have sex with her in one of the rooms.

In May, the Alaska State Troopers investigated the death of a two-month-old in Shugnak. It was determined that the child's mother, had gone to bed intoxicated, in the same bed as the child. She apparently rolled onto the child and smothered her. During the investigation it was found that the mother had another child, a one month old, that had died under identical circumstances in 2000. In September, the grand jury indicted the defendant for both deaths, charging criminally negligent homicide for the first child and alternate charges of manslaughter and second degree murder in the death of the second child.

A Kotzebue man was charged with nine counts of assault in the third degree, one count of felony eluding, driving under the influence, and reckless driving, after a series of incidents in the village of Noorvik. He was drunk and driving a four-wheeler around the village at a high rate of speed, and narrowly missed a number of pedestrians.

NOME

A man was indicted on multiple counts of felony assault stemming from a series of incidents in Teller. He had been drinking with several other people when he launched into a fit of jealous anger after another man's jokes about his girlfriend. Two victims were stabbed and two other were threatened with a knife.

Also charged with a felony assault is a man accused of having threatened his girlfriend with a rifle. The case is complicated by the fact that the girlfriend is deaf and communicates in sign language.

A Nome man was also charged with pointing a rifle at his wife. One entertaining aspect of the case is that he claimed it was actually his didgeridoo that he pointed at his wife. No, it's not a new slang term, but an Australian wind instrument. There actually was such an instrument in the house, but it was not what Carlisle had used to threaten the victim.

A Department of Transportation employee was indicted for misconduct involving a controlled substance after a felony quantity of marijuana was found inside a microwave that had been shipped to him. Suspicion was aroused when it was noticed that this was the fourth microwave that he had received this year, and a Savoonga man told police he had been selling marijuana for the defendant. In addition, the defendant's brother was later indicted after his fingerprints were found on the shipment, and employees at the cargo airline identified him as the shipper of the package.

In a somewhat similar case, a couple from Gambell was indicted on misconduct involving controlled substances in the fourth degree, when marijuana was discovered inside packages of frozen hamburger shipped to Gambell in a cooler. The freight airline became suspicious when they noticed the same cooler was regularly shipped back and forth between Gambell and Anchorage.

A man was indicted for second degree murder in the death of his father. The two had been arguing all night long at various bars. At one point, about four in the morning, the son attempted to leave a bar outside of Nome, driving a dump truck owned by his father. The father jumped on the bumper of the vehicle, apparently to try to stop his son. The father apparently rode on the bumper for several miles before he fell off and was run over by the truck. The man was also indicted for felony criminal mischief; after the incident with his father, he drove 75 miles to Teller and drove the dump truck into his mother's house, destroying a portion of it.

Petitions & Briefs of Interest

Briefs of Interest

Juror Questioning Of Witnesses. The state argues that the trial court did not abuse its discretion when, after each witness's testimony, jurors were allowed to submit written questions, and the questions were then reviewed by the judge and the attorneys to screen out potentially irrelevant or prejudicial matters. The attorneys were also given the opportunity to ask follow-up questions. The state argues that juror questioning of witnesses has been approved by a vast number of jurisdictions (federal and state) when similar procedures are followed. *Landt v. State*, A-8154.

Reasonable suspicion on basis of abbreviated report. A citizen called the Ketchikan police and said that "there was an intoxicated man getting into a white Toyota Tercel, Arkansas license 599GHN on Mission Street near the five-and-dime store." The state argues that this anonymous phone call provided sufficient basis to infer the caller's personal knowledge of the driver's intoxication, and thus provided reasonable suspicion for an investigatory stop. *Smith v. State*, A-8510.

Background Noise on 911 Tape Recording Not Hearsay – The state argues that the crying of a baby, along with the victim's crying, heard on a 911tape-recording were not assertions and accordingly not statements barred by the rule against hearsay. The state argues alternatively that even if crying is considered a statement, then it was admissible under the state-of-mind hearsay exception. *Tuilaepa v. State*, A-8418.

Jury tampering and First Amendment. In an appeal from the denial of a habeas application, the state argues to the Ninth Circuit Court of Appeals that the communications prohibited by Alaska's jury-tampering statute do not constitute speech protected by the First Amendment. The state relies in part on cases construing a defendant's Sixth Amendment right to a fair trial and which all but hold that communications intended to influence juries do not have constitutional protection. *Turney v. Pugh*, No. 03-35165.

Indecent-viewing statute. AS 11.61.123 allows an affirmative defense to a prosecution for indecent viewing if notice of the viewing or photography is posted and conducted as part of security surveillance. The state argues to the court of appeals that the words "notice" and "posted" in the statute are not unconstitutionally vague. The state also argues that the statute was violated each separate time the defendant videotaped his stepdaughter showering, dressing, and undressing. *Kea v. State*, A-839

Statute and Rule Interpretations

AS 12.20.050 and failure to prosecute. The court of appeals interpreted AS 12.20.050 and Alaska Criminal Rule 43(c) as not barring the refiling of misdemeanor charges when the charges are initially dismissed at the defendant's arraignment for a failure to prosecute. In the particular case, neither a law enforcement officer nor a prosecutor appeared at the defendants' arraignment on misdemeanor hunting violations. *Schouten v. State*, Op. No. 1901 (Alaska App., September 26, 2003).

Statute and Rule Interpretations

Evidence Rule 404(b) other-act evidence is subject to Evidence Rules 402 and 403. The court of appeals held that when the defendant's other acts are sought to be admitted under subsections (b)(2), (b)(3), and (b)(4) of Evidence Rule 404, a trial judge must apply on the record the relevancy requirement of Evidence Rule 402 and the balancing calculus of Evidence Rule 403 before admitting the

evidence. *Bingaman v. State*, Op. No. 1895 (Alaska App., August 22, 2003).

AS 11.71.060 held unconstitutional with respect to non-commercial possession in the home. The court of appeals held that, to the extent that AS 11.71.060(a) criminalizes possession of less than four ounces of marijuana by a person in a purely personal, non-commercial context in the home, the statute violates a person's right to privacy under article I, section 22 of the Alaska Constitution. The state has filed a petition for rehearing on this holding. *Noy v. State*, Op. No. 1897 (Alaska App., August 29, 2003).

Preempting a judge under Criminal Rule 25(d)(2); mailbox rule does not apply. The court of appeals interpreted Criminal Rule 25(d)(2), under which a party may preempt a judge by filing a notice of change of judge within five days of the judge's assignment, as requiring that the notice be filed with the court and not simply mailed in five days. *Black v. State*, Op. No. 1896 (Alaska App., August 29, 2003).

Petitions of Interest

Conditional Relevance – statements by codefendants. A cab driver picked up three defendants who had beaten and robbed a man. The cab driver overheard the three men bragging about beating up the victim, but could not tell which of them was speaking at any particular time. The trial judge ruled that the cab driver could not testify regarding the statements he overheard because he could not tell who was speaking. The court of appeals granted the state's petition for review and directed the trial court to determine whether the evidence as a whole was sufficient to convince a reasonable fact-finder that the words had been spoken by one of the defendants or a co-conspirator, but not by someone else. If so, the court held that the statements should be admitted at trial, leaving it for the jury to resolve the factual issue of which defendant spoke the words. *State v. Hall/Knight*, A-8680.